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Before the
FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)	
)	MM Docket No. 94-125
Amendment of Section 73.202(b),)	
Table of Allotments,)	RM-8534
FM Broadcast Stations)	RM-8575
(Fredericksburg, Helotes)	
and Castroville, Texas))	

To: Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

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PETITION FOR RECONSIDERATION

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SUMMARY

October Communications Group, Inc. ("petitioner") requested the reallocation of Channel 266C from Fredericksburg, Texas, to Helotes (or, alternatively, to Castroville), Texas, as its first local service. Under the proposal, Fredericksburg would continue to receive local radio service. Petitioner established that Helotes (and Castroville) qualify as communities and are deserving of a first local service.

Nevertheless, the Commission denied the reallocation because it could not find that the provision of a first local service to Helotes or Castroville (priority (3)), outweighed the loss of one of two transmission services to Fredericksburg (priority (4)). The Commission staff found that Helotes and Castroville are smaller in population than Fredericksburg, located closer to the San Antonio Urbanized Area and have a greater number of reception services. In finding that these "other public interest factors" were relevant, the staff relied extensively on the case of Van Wert, Ohio, and Monroeville, Indiana, 7 FCC Rcd 6519 (1992).

The Commission has ignored numerous similar cases favoring the first local service preference. Instead, it has elevated the "other public interest factors" to a greater extent than ever before in denying a first local service in this case. The

overwhelming body of case law in the change of community context favors the reallocation requested in this case. In all other cases, except Van Wert, the staff has granted a first local service despite the new community being (1) smaller and (2) closer to, but outside, an Urbanized Area. These factors have traditionally been relegated to "tie breakers" where the two communities in comparison have the same priority. These factors have not been used to deny a first local service to a community outside an Urbanized Area (except Van Wert). The smaller community seeking a first local service is preferred over a larger community already having local service in every other case decided under this procedure. The proximity of a community near an Urbanized Area does not place the burden on the petitioner to demonstrate other public interest benefits. Rather, the presumption is in favor of the first local service community.

The Van Wert case, which was so heavily relied upon by the Commission, is an anomaly and is fatally discredited because it relied on a 1958 case, Plainview Radio, et al., 24 FCC 405 (1958) which was reversed on appeal. It has never been used as precedent to deny a first local service in the manner that has been done in this case.

For these reasons, petitioner respectfully requests that the staff reconsider its egregiously erroneous decision and reallocate Channel 266C to Helotes or Castroville as a first local service.

TABLE OF AUTHORITIES

The following table relates to authorities cited in the text of the petition. In addition, Exhibit A is a compilation of 57 agency cases where the size of the proposed community of license and its proximity to a central city did not present an impediment to the reallocation, and the number of reception services in the present and proposed communities of license were not even considered relevant.

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PETITION FOR RECONSIDERATION

October Communications Group, Inc. ("petitioner" or "OCG"), licensee of Station KONO-FM, Channel 266C, Fredericksburg, Texas, by its counsel and pursuant to Section 1.429 of the Commission's Rules, submits this Petition for Reconsideration of the Report and Order, 10 FCC Rcd 6580 (1995)^{1/} which favored a second local service to Fredericksburg, Texas, over a first local service to Helotes or Castroville, Texas. As will be discussed, the staff decision is inconsistent with the overwhelming body of case law in this area which supports the grant of a first local

^{1/} 60 Fed. Reg. 32298, pub. June 21, 1995. This petition for reconsideration is filed within 30 days of publication of the Report and Order in the Federal Register. See Section 1.429(d) of the Commission's Rules.

service. Except for one anomalous case, the Commission has never before elevated the lesser priority of "other public interest factors" -- relative size, proximity to a larger central city and number of reception services -- to deny a first local service to a recognized community outside an Urbanized Area. The anomalous case of Van Wert, Ohio, and Monroeville, Indiana,^{2/} upon which the staff relies heavily, is distinguishable and has not been used previously as precedent to deny a first local service. More significantly, as will be shown (¶¶31-33, the Van Wert case is of questionable precedential value because it relied upon a decision which was reversed on appeal. We submit that the Commission staff must also reverse its decision here and instead reallocate Channel 266C to Helotes or Castroville in accordance with the prevailing body of case law.

I. BACKGROUND

1. On May 6, 1994, OCG filed a Petition for Rule Making requesting that Channel 266C be reallocated from Fredericksburg to Helotes, Texas, to provide a first local service, and that KONO-FM's license be modified to specify Helotes as that station's community of license. Petitioner provided the requisite indicia of community status^{3/} and met each of the

^{2/} 7 FCC Rcd 6519 (1992).

^{3/} See "Petition for Rule Making", ¶¶1-2; "Comments and Contingent Counterproposal", pp. 4-6 and Exhibits B-E.

prerequisites to justify the issuance of a Notice of Proposed Rule Making ("Notice"), 9 FCC Rcd 6471 (1994). In particular, petitioner demonstrated that Fredericksburg would continue to receive local service from Station KNAF(AM) operating on 910 kHz. The Notice recognized that the proposed reallocation to Helotes would provide a first local service and that Helotes was located outside the San Antonio Urbanized Area. The Notice stated, however, that the staff was unable to conclude that the proposal would result in a preferential arrangement of allocations despite the provision of a first local service to Helotes. The staff noted that petitioner proposed a smaller community, within the Rand McNally San Antonio Metropolitan Area (though not within the Urbanized Area), which is already well served by five or more reception services and that petitioner did not propose to relocate its site and thereby provide additional reception service.

2. On December 29, 1994, petitioner submitted its "Comments and Contingent Counterproposal" responding to the staff's concerns. Petitioner emphasized that Helotes is an incorporated city located outside the San Antonio Urbanized Area, and therefore was entitled to the presumption of independence. Furthermore, this presumption was not automatically diminished by being located within the Rand McNally San Antonio Urbanized Area. Most importantly, petitioner emphasized that the proposal for a first local service at Helotes should be preferred over a second local

service at Fredericksburg based on the Commission's priorities and past precedent.

3. Petitioner stated that it was fully committed to serving Helotes and believed that the public interest would be better served by the reallocation. However, petitioner indicated that if the Commission was still concerned about the small population of Helotes and its location within the Rand McNally Metropolitan Area, the petitioner would, as an alternative, be interested in serving Castroville, Texas.^{4/} Castroville is located in a separate county (Medina) and is located not only outside the San Antonio Urbanized Area but also outside the Rand McNally San Antonio Metropolitan Area as well. Furthermore, Castroville has a larger population than Helotes (2,159 to 1,535).^{5/} Castroville is incorporated and contains all of the attributes of a community deserving of a first local service.

4. On January 13, 1995, petitioner submitted "Reply Comments", which reiterated its desire to provide Helotes with a first local service and pointed out that no one had objected to its proposal. On February 2, 1995, OCG submitted "Further Reply Comments", which made similar points regarding its Castroville counterproposal.

^{4/} On January 18, 1995, the Commission issued a Public Notice accepting the Castroville proposal. Report No. 2052.

^{5/} All population figures are taken from the 1990 U.S. Census.

5. On June 16, 1995, the Commission released its Report and Order denying both Helotes and Castroville a first local service on the ground that "we cannot find that the reallocation of Channel 266C to either Helotes or Castroville provides a public interest benefit significant enough to override the loss of Fredericksburg's sole local FM transmission service." Report and Order at 6582. While the Commission made reference to the Rand McNally Metropolitan area as a relevant standard in its initial notice, the Commission retreated from the use of any such standard in the Report and Order. However, despite the fact that neither Helotes nor Castroville is located within the San Antonio Urbanized Area, the Commission, in comparing the two communities, placed particular emphasis on the relative size, proximity to a large central city, and number of reception services. Petitioner submits that under all relevant case law other than the discredited Van Wert case, the provision of a first local service to Helotes (or Castroville) is of sufficient public interest benefit to outweigh the loss of one of two transmission services at Fredericksburg.

II. INTRODUCTION

6. Never before in the nearly six years since the Commission has entertained the relicensing of channels to different communities has the Commission elevated such "other public interest factors" to this extent over the provision of a first local service.

7. The Commission has stated that it "will not presume that a community outside of, but near, an Urbanized Area is not entitled to a first local transmission service preference." Van Wert, supra, at 6520. But, that is exactly what the Commission has done in this case. It has presumed that Helotes and Castroville's proximity to San Antonio requires a party wishing to serve either of these communities to demonstrate something more than a first local service even though the presumption is supposed to work in favor of -- not against -- communities outside Urbanized Areas. The Commission has taken the relatively minor factors of size, proximity to a larger central city, and number of reception services to justify the retention of a second local service to Fredericksburg over a first local service to Helotes or Castroville.

8. Petitioner has studied every reported case involving change in community of license and has found only one anomalous case which favored a second local service over a first local service -- Van Wert, Ohio, and Monroeville, Indiana, 7 FCC Rcd 6519 (1992). As will be shown, there are important differences in that case justifying a contrary result in the present case. However, more importantly, the Van Wert case itself relied entirely on a 1958 decision (Plainview Radio, et al., 24 FCC 405 (1958)), which was reversed on appeal, sub nom. Harrell v. FCC, 267 F.2d 629 (D.C.Cir. 1959). Thus, not only is Van Wert of questionable validity as precedent for anything, the Commission

has wisely refused to apply Van Wert as precedent for any subsequent case to deny a first local service until now.

III. THE COMMISSION PRESUMES A FIRST LOCAL SERVICE ENTITLEMENT FOR COMMUNITIES OUTSIDE AN URBANIZED AREA

9. It is well established that the Commission will not presume that a community outside of, but near, an Urbanized Area as defined by the Census Bureau is not entitled to a first local transmission service preference. E.g., Nowata and Collinsville, Oklahoma, MM Docket No. 91-255 (released June 27, 1995); Sulphur, Louisiana, et al, 10 FCC Rcd 4952 at 4954 (1995). This policy follows the development of case law from Huntington Broadcasting Company^{6/} in 1951 to Faye and Richard Tuck^{7/} in 1988. Regarding the extent to which Helotes' proximity to San Antonio is relevant, petitioner argued that consideration of location within the "Rand McNally Metropolitan area" (as set forth in the initial notice in this case) did not conform to the Commission's ruling in Huntington Broadcasting Company, supra, as to which the Commission has said, Huntington "is a very limited exception to Section 307(b), we are ever wary of extending it beyond the doctrine's original premises concerning the overlapping transmission needs of a central city and its contiguous suburbs." Faye and Richard Tuck, 3 FCC Rcd at 5379-

^{6/} 5 RR 721, rehearing den., 14 FCC 563 (1950); aff'd 192 F.2d 33 (D.C. Cir. 1951).

^{7/} 3 FCC Rcd 5374 (1988).

5380 (1988). Neither Helotes nor Castroville is a contiguous suburb of San Antonio. Moreover, in Tuck the Commission specifically refused to expand the relevant area of concern from the Urbanized Area of the Census Bureau to the more expansive Metropolitan Area of the Census Bureau, with which the Rand McNally Metropolitan area is more closely allied. In Tuck, the Commission placed the burden on a party objecting to an allotment (here, no party has objected) to show dependence on the central city without relying on its location within a metropolitan area.

10. Petitioner offered extensive information on Helotes and Castroville's independence from San Antonio. Each has their own local government with municipal services for their residents, their own businesses community events and cultural organizations which, in the case of Helotes, attracts 100,000 persons annually for its "Cornyval" run by the Helotes Festival Association and in the case of Castroville, its rich cultural heritage of the Alsatian French community with its separate needs and interests. Moreover, for Helotes, such an allotment would serve to reestablish a local service formerly enjoyed by the community.

11. Petitioner has commissioned its engineer to study the availability of alternate AM or FM frequencies for allotment to either Helotes or Castroville. The results of that study are that there are no frequencies available for use under the Commission's technical standards. Accordingly, this proposal

offers the only possibility of a first local service to either Helotes or Castroville.

12. The record in the proceeding clearly supports a finding of independence even without the benefit of a presumption. However, the Commission staff still seemed inclined to impose a heavy burden of proof on the petitioner to demonstrate that the needs of Helotes and Castroville outweigh the factors of relative size, proximity to a larger community, and number of reception services. The Commission was wrong to apply these factors in this fashion. These factors traditionally have been used to break a tie when the priorities between two requested communities fall into the same category, not when there is a clear preference in the priority rankings. The overwhelming body of case law demonstrates that the Commission has not applied these factors to deny a first local service outside an Urbanized Area. See Exhibit A (a compilation of Commission cases, where size and proximity did not present an impediment to the reallocation, and the number of reception services in the two communities were not even considered relevant).

IV. EXISTING CASE LAW FAVORS A FIRST LOCAL SERVICE

13. In Marion and Orrville, Alabama, 6 FCC Rcd 3482 (1991), the Commission granted the reallocation of Channel 247A from Marion (population 4,467) to Orrville (population 349) as a first local service leaving Marion with a daytime only AM

station. Orrville is located much closer to the larger city of Selma (population 23,755) than was Marion. Despite Orrville's small size, the Commission did not discuss the relative size or proximity to Selma nor the number of reception services in favoring a first local service.

14. In Scotland Neck and Pinetops, North Carolina, 7 FCC Rcd 5113 (1992), pet. for recons. pending, the Commission granted the reallocation of Channel 238C3 from Scotland Neck (population 2,575) to the smaller community of Pinetops (population 1,514) leaving Scotland Neck with a daytime only AM station and providing Pinetops with a first local service. Over the objection of another broadcaster, the Commission recognized Pinetops as an independent community from the larger central city of Rocky Mount even though the new community was much closer to the Urbanized Area than the old community. The staff was not concerned that the proposed service area would cover the Rocky Mount Urbanized Area because the station's existing service area already covered much of the Rocky Mount Urbanized Area. See also Canovanas, et al., Puerto Rico, 10 FCC Rcd _____ (released June 22, 1995) (where the proposed new station at Las Piedras would cover the Urbanized Area^{8/}); Fruitland and Weiser, Idaho, 7 FCC Rcd 7538 (1992) (where the

^{8/} The Canovanas case also cites Blackville, et al., South Carolina, 7 FCC Rcd 6522 (1992), as being in accord with Van Wert. However, in Blackville, the Moncks Corner licensee accepted an upgrade at the old community rather than pursue a first local service at Kiawah Island.

new community (Fruitland) was smaller and closer to a larger central city than the old community (Weiser) which retained a daytime only AM station).

15. In Mora, Bosque Farms and Socorro, New Mexico, 8 FCC Rcd 791 (1993), the Commission granted the reallocation of Channel 284C from Socorro to Bosque Farms which is located much closer to the Albuquerque Urbanized Area. Socorro retained only a daytime AM station. The Commission did not even consider it relevant to mention the much closer proximity of Bosque Farms to an Urbanized Area nor the relative reception services of the two communities where no site change was proposed. It was sufficient that Bosque Farms would receive a first local service.

16. In Ravenswood and Elizabeth, West Virginia, 10 FCC Rcd 3181 (1995), the Commission granted a first local service to Elizabeth (population 900) over the continuation of a first full time service at Ravenswood (population 4,189). As in the instant case, the community receiving a first local service is smaller and closer to a larger central city. Moreover, Ravenswood, like Fredericksburg, would be left with a daytime AM station. The Ravenswood/Elizabeth decision stated that, "[w]e find that the reallocation to Elizabeth should be made because it

triggers the higher allotment priority of a first local transmission service."^{2/}

17. Finally, in Bolivar and Nixa, Missouri, 6 FCC Rcd 3648 (1991), the Commission found that the reallocation of Channel 290C2 from Bolivar (population 5919) to Nixa (population 2,662) would result in a preferential arrangement of allotments. Bolivar was left with a daytime only station (KY00). Nixa is located much closer (within 5 miles) to the Springfield, Missouri (population 140,494) Urbanized Area. The number of reception services was not considered. Nixa clearly would have had a greater number of reception services from thirteen stations licensed to Springfield.

18. Any of these cited cases would properly serve as precedent for a grant of a first local service to Helotes or Castroville. The Commission failed to distinguish how any of these cases were inapplicable as precedent to the instant case. These cases consistently favored the smaller community and the community which was closer to an Urbanized Area. The Commission was not concerned with the relative number of reception services

^{2/} The Commission's concern about the removal of Ravenswood's only local nighttime transmission service was ameliorated by the fact that Ravenswood has at least five full-time reception services and by the fact that a construction permit has been issued for another FM station in Ravenswood (at 3181). Here, the Commission also found that there are more than five reception services in Fredericksburg and that an allotment of a new local VHF television station has been made to that community for which proceedings have progressed to the issuance of an ALJ's Initial Decision.

other than to find in a few cases that there were five or more reception services in the vacated community.

19. As will be shown, when taken separately, except for the discredited Van Wert decision, none of the cited factors (size, proximity, or reception services) has been used in past cases to deny a first local service to a community outside an Urbanized Area.

**A. THE RELATIVE SIZE OF THE NEW COMMUNITY
HAS NOT BEEN AN IMPEDIMENT**

20. The Commission has traditionally granted a first local service to a smaller community over a larger community with one or more services. In Exhibit A, petitioner has demonstrated that in numerous cases of this type the relative size has not been an impediment where the new community has a higher precedent. See, e.g., Ravenswood, 10 FCC Rcd 3181 (allowing reallocation from city with 4189 people to city with 900 people); Oshkosh, Winneconne & Townsend, Wisconsin, and Menominee, Michigan, 10 FCC Rcd 2085 (1995) (allowing reallocation from city of 57,000 to city of 2059); Pine Bluff and Maumelle, Arkansas, 6 FCC Rcd 5119 (1991) (allowing reallocation from city with 56,636 people to city with 5,704 people); Paragould and Lake City, Arkansas, 6 FCC Rcd 3325 (1991) (allowing reallocation from city with 15,214 people to city with 1,842 people); Lemoore and Tipton, California, 6 FCC Rcd 2593 (1991) (allowing reallocation from city with 8832 people to city with 1185 people);

Jessup/Midway, Georgia, 6 FCC Rcd 2196 (1991) (allowing reallocation from city of 9,418 people to city of 457).

21. The only time the Commission has not favored a first local service is in the rare instance where it finds the first local service community to be a "quiet village." In Marion and Orrville, Alabama, supra, the Commission specifically refused to consider Orrville (population 349) to be a quiet village. There is no suggestion or conceivable basis to hold that either Helotes or Castroville is a quiet community, and the Report and Order acknowledges that both are communities for allocation purposes.

**B. RELATIVE PROXIMITY OF THE NEW COMMUNITY
TO THE LARGER CENTRAL CITY IS NOT A BAR**

22. As indicated earlier (¶9), it is well established that the Commission will not presume that a community outside of, but near, an Urbanized Area as defined by the Census Bureau is not entitled to a first local transmission service preference. The Commission has consistently reallocated channels from rural communities to communities nearer urbanized areas. For example, in Socorro and Bosque Farms, supra, the Commission reallocated a Class C channel from Socorro to Bosque Farms even though Bosque Farms was far closer than Socorro to the Albuquerque Urbanized Area. The Commission did not consider the proximity to be worthy of mention.

23. Similarly, in Scotland Neck and Pinetops, North Carolina, Pinetops is much closer than Scotland Neck to the Rocky Mount Urbanized Area. See also Bolivar and Nixa, supra; Kindred and Oakes, North Dakota, 7 FCC Rcd 1996, 1996 (1992) (reallotting station from city of 2030 to city of 569, despite fact that smaller community would provide 60 dBu service to Fargo, North Dakota); Kershaw, South Carolina and Waxhaw, North Carolina, 7 FCC Rcd 656 (1992) (reallotting station from Kershaw, South Carolina to Waxhaw, North Carolina, even though Waxhaw was smaller and closer to Charlotte, North Carolina); Callahan, Florida and St. Marys, Georgia, 6 FCC Rcd 7564 (1991) (reallotting station from St. Marys, Georgia to Callahan, Florida, even though Callahan was smaller and closer to Jacksonville, Florida); Pine Bluff, supra. (reallotting station from Pine Bluff to smaller city near Little Rock). See Exhibit A.

24. The Commission was initially concerned that Helotes was located in the Rand McNally San Antonio Metropolitan Area. However, the Commission specifically found that such proximity was not an obstacle in a recent case released after the instant case, Canovanas, Culebra, Las Piedras, Mayaguez, Quebradillas, San Juan, and Vieques, Puerto Rico, and Christiansted and Fredericksted, Virgin Islands, MM Docket No. 91-259 (released June 22, 1995). In that case, the Commission reallotted a station from Vieques, Puerto Rico to Las Piedras, Puerto Rico, even though "Las Piedras is within the San Juan and Caguas

Metropolitan Statistical Areas". Id. at ¶16. The Commission reasoned that Las Piedras (like Helotes) "is an independent community with its own local government...[and] is not located within any Urbanized Area." Id.

25. In sum, the Commission has refused to extend the presumption of interdependence beyond the Urbanized Area. See Faye and Richard Tuck, supra. Yet, here, despite the extensive community data demonstrating independence from San Antonio (having separate government, police, fire, school, social and other community structures) and the Commission's finding in the Report and Order that Helotes is a community deserving of a first local service, the Commission did not give Helotes the benefit of the presumption. The same is true of Castroville as well. Based on the overwhelming number of cases to the contrary, the Commission's disparate treatment must be reconsidered here.

**C. THE RELATIVE NUMBER OF RECEPTION SERVICES IS
IRRELEVANT SO LONG AS FREDERICKSBURG CONTINUES
TO HAVE AT LEAST FIVE RECEPTION SERVICES**

26. The Commission compared the number of reception services remaining in Fredericksburg to the number of such services in Helotes and Castroville. In past cases the Commission found that if there were five or more reception services remaining, then it would not make any further comparison. Ravenswood, supra. Here, the Commission

specifically found that Fredericksburg would be left with seven aural reception services both before and after the reallocation.

27. Generally, a community which is located much closer to an urbanized area will receive more radio stations than a more isolated community would. Thus, as shown in Exhibit A, the Commission has not compared the number of reception services in the two communities. Even in the case of Van Wert, the Commission did not consider the relative number of reception services in the two communities. What the Commission does try to ensure is the retention of at least five aural reception services. See Ravenswood supra. As stated, Fredericksburg will continue to have more than five aural reception services if the proposal were approved.

**IV. THE COMMISSION RELIED ENTIRELY ON A CASE,
VAN WERT, OHIO, AND MONROEVILLE, INDIANA,
WHICH IS ANOMALOUS AND OF QUESTIONABLE PRECEDENT**

28. The Commission has relied entirely on the case of Van Wert, supra, as precedent for denying a first local service here. In Van Wert, the Commission denied the reallocation from Van Wert (population 11,035) to Monroeville (population 1,372) as a first local service. The Commission found that Monroeville is much closer to an urbanized area (Fort Wayne) than Van Wert and that Monroeville is one-seventh the size of Van Wert. It also noted that petitioner was not proposing a reception service improvement.

29. The Commission's reliance on Van Wert is erroneous, for two reasons. First, there are factual differences in the two cases. In the instant case, the Commission found that the factual situation is "less stark than Van Wert". Report and Order, supra, at 6583. Helotes is about one-fourth and Castroville about one-third the size of Fredericksburg, while Monroeville was one-seventh the size of Van Wert. Helotes is also 20 miles from downtown San Antonio while Monroeville is located 17 miles from downtown Fort Wayne, Indiana. See Comments and Contingent Counterproposal at ii (Dec. 29, 1994); Van Wert, 7 FCC Rcd at 6519.^{10/}

30. Second, the Van Wert decision relied on a case which was reversed! In concluding that the Monroeville proposal for a first local service did not outweigh the retention of a second local service at Van Wert, the Commission relied entirely on Plainview Radio, et al., 15 RR 363, 24 FCC 405 (1958) (Plainview), reversed sub. nom. Harrell v. FCC, 18 RR 2072, 267 F.2d 629 (D.C. Cir. 1959), on remand sub. nom. Plainview Radio, 21 RR 885 (1961). (A copy of the Plainview decision is attached as Exhibit B.) See Van Wert, 7 FCC Rcd at 6521 n. 10. Initially, in Plainview, the Commission made a Section 307(b) finding in the context of a comparative hearing that the public

^{10/} We note that Castroville is even larger than Helotes, and even further from San Antonio. See Report and Order, supra, at 2-3 (Castroville is larger and 8 miles further from San Antonio than Helotes); Comments and Contingent Counterproposal, Exhibit I (Dec. 29, 1994) (Castroville is located 40 miles from the San Antonio airport).